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May 25, 2004
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: February 20, 2004

Case No.: TIA-0053

XXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for assistance in filing for state workers' compensation benefits. The Applicant has been a DOE contractor employee at a DOE facility since 1981. The OWA referred the application to an independent physician panel, which determined that the worker's illness was not related to her work at DOE. The OWA accepted the panel's determination, and the Applicant filed an appeal with the DOE's Office of Hearings and Appeals (OHA). As we explain below, we have concluded that the physician panel's determination is correct.

I. Background

The Energy Employees Occupational Illness Compensation Program Act

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the Act) concerns workers involved in various ways with the nation's atomic weapons program. See 42 U.S.C. §§ 7384, 7385. The Act provides for two programs.

The Department of Labor (DOL) administers the first program, which provides \$150,000 and medical benefits to certain workers with specified illnesses. Those illnesses include beryllium disease and specified cancers associated with radiation exposure. 42 U.S.C. § 7341l(9). The DOL program also provides \$50,000 and medical benefits for uranium workers who receive a benefit from a program administered by the Department of Justice (DOJ) under the Radiation Exposure Compensation Act (RECA) as amended, 42 U.S.C. § 2210 note. See 42 U.S.C. § 7384u. To implement the program, the DOL has issued regulations, 20 C.F.R. Part 30, and has a web site that provides extensive information concerning the program.^{1/}

^{1/} See www.dol.gov/esa.

The DOE administers the second program, which does not itself provide any monetary or medical benefits. Instead, it is intended to aid DOE contractor employees in obtaining workers' compensation benefits under state law. Under the DOE program, an independent physician panel assesses whether a claimed illness or death arose out of and in the course of the worker's employment, and exposure to a toxic substance, at a DOE facility. 42 U.S.C. § 7385o(d)(3). In general, if a physician panel issues a determination favorable to the employee, the DOE instructs the DOE contractor not to contest a claim for state workers' compensation benefits unless required by law to do so, and the DOE does not reimburse the contractor for any costs that it incurs if it contests the claim. 42 U.S.C. § 7385o(e)(3). To implement the program, the DOE has issued regulations, which are referred to as the Physician Panel Rule. 10 C.F.R. Part 852. The OWA is responsible for this program and has a web site that provides extensive information concerning the program.^{2/}

The Applicant has been employed at a DOE facility since 1981. The Applicant is a High Level Waste Processing Operator. In 1986, at the age of 38 years, the worker was diagnosed with Glomus Tympanicum Tumor of the right middle ear. The tumor has recurred on three subsequent occasions.

The Applicant filed an application with DOE, the application at issue in this case. The Applicant identified a recurring tumor as the illness on which she sought physician panel review and attributed this tumor to exposure to toxic substances, including xenon, krypton, and radiation.

The physician panel reviewed the application and issued a report. The panel found that the tumors were not related to exposure to a toxic substance at DOE. The panel based its determination on four factors, the first three of which support the panel's position that the Applicant had the tumor before her employment with DOE. First, the panel found that the period from initial exposure to the toxic substances to the diagnosis of the tumor was less than the latency period, *i.e.*, less than five years. The panel found that such a short period indicated that the tumor pre-dated her DOE employment. Secondly, the panel found that the large size of the tumor when it was originally diagnosed indicated that it pre-dated her DOE employment. Thirdly, the panel found that the characteristic slow growth of this type of tumor indicated that it pre-dated her DOE employment. Finally, the panel found that the lack of any known associations of environmental exposures with this type of tumor indicated that it was not related to her employment at the DOE facility.

The OWA accepted the physician panel's determination. See January 21, 2004 Letter from the DOE to the Applicant. Accordingly, the OWA determined that the Applicant was not eligible for DOE assistance in filing for state workers' compensation benefits.

^{2/} See www.eh.doe.gov/advocacy.

In her appeal, the Applicant contends that the physician panel determination is wrong. She states that the fact that she has had four tumors in rapid succession is rare. She states that the last three tumors grew very fast.

II. Analysis

The Applicant maintains that because she is of small stature and weighs less than the average worker, the same amount of chemical radiation and contamination has a greater effect on her than on an average size person. Further, she claims that she was routinely exposed to toxic chemicals without adequate protective equipment or clothing. Additionally, she alleges that many of the chemicals that were routinely used during the 1980's are no longer allowed today because they are too hazardous and that safeguards and practices with regard to radiation and contamination exposures were much more lax in the 1980s. The Applicant concludes that she believes her job as a High Level Waste Processing Operator at the DOE facility contributed to her tumor growths.

The Applicant maintains that the panel determination contains several factual errors. First, the Applicant maintains that the panel erred when it stated that glomus tympanicum tumor is a common neoplasm. Although the Applicant maintains that to have four tumors in rapid succession is not common, that statement, even if correct, does not mean that the type of tumor is not common. In any event, the panel notes that a period of little growth of the tumors can be followed by rapid growth and, therefore, that the rate of recurrence does not render the tumor uncommon. Second, the Applicant claims that she has been told by a number of physicians that she is fortunate to have found the tumors early so that they had not metastasized. The panel pointed out this fact and, therefore, there is no disagreement on this point. Finally, the Applicant claims that the panel erred in stating that she first began having pulsatile tinnitus, which was then diagnosed as the glomus tympanicum tumor. In fact, the Applicant states, the pulsatile tinnitus occurred after she had the surgery to remove the tumor. The record is not clear on this point. One report from the Applicant's doctor indicates that she sought treatment because she heard a "swishing sound." However, even if the panel erred about the initial symptom of the tumor, the error is not relevant to the panel's finding that the tumor predates her employment with DOE.

The Applicant has not demonstrated that the panel erred in its conclusion that her tumors were not related to her DOE employment. The panel explained why it did not find that it was at least as likely as not that exposure to a toxic substance at a DOE facility during the course of the Applicant's employment was a significant factor in aggravating, contributing to or causing the worker's illness. As stated above, the short period between the start of the potential exposure to the diagnosis, the large size of the tumor when it was found, the characteristic slow growth of this type of tumor, and the lack of known associations of environmental exposure with this type of tumor led the panel to find that

the Applicant's job at the DOE facility is a very unlikely factor in the occurrence or growth pattern of the glomus tumor. Based on the foregoing, the weight of the evidence supports the panel determination.

III. Summary and Conclusion

As the foregoing discussion indicates, the Applicant has not demonstrated error in the physician panel determination. Accordingly, the appeal should be denied.

It Is Therefore Ordered That:

- (1) The Appeal filed in Worker Advocacy Case No. TIA-0053 be, and hereby is, denied.
- (2) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: May 25, 2004

CONCURRENCE SHEET

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Fishman	Cronin	Freimuth